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In the Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES R. SHEPHERD,
Petitioner

v.

GAIL ADAMS SHEPHERD,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Before discussing the legal merits of this Application for Certiorari, the Respondent needs to add to the factual statements:

(1) The Application for Certiorari would lead the reader to the conclusion that the Husband is faced with continuing burden to pay alimony. This is not correct. The last installment of alimony was in August of 1976 when the Wife remarried. Her remarriage completely and permanently terminated any further right to any payment of alimony.

(2) The total amount levied against the Husband was for: (a) temporary support; (b) attorneys fees; (c) permanent alimony; (d) court costs; and, (e) interest. Part of these amounts were levied against him when he was found in contempt of court.

(3) The permanent alimony has all been paid by the Husband.

(4) The "wives only" alimony statutes referred to by Petitioner were repealed by the Georgia Legislature in 1979 (*Ga. Code Ann.*, § 30), and replaced by a completely constitutional law allowing alimony

to either party. The new laws are not challenged in any respect.

Furthermore, the Georgia Supreme Court has always completely accepted the holding of this Court in *Orr v. Orr*, 440 U.S. 268, [*Stitt v. Stitt*, 243 Ga. 301 (March 8, 1979)], and the Georgia Courts uniformally apply *Orr v. Orr* (supra.).

(5) At no place in the Application for Certiorari has the Petitioner made any attempt to show that this is a proper matter for Certiorari. There is nothing hereby but a private controversy with no implications or effect beyond this case.

(6) The ruling of the Georgia Supreme Court from which this Application is taken does not mention alimony or any other issue which the Petitioner attempts to raise. That decision deals with the failure of the Petitioner to properly follow the rules of appellate procedure in Georgia. The pertinent portion of that decision says:

> "It appearing that no application for discretionary appeal has been filed, this case must be and is hereby dismissed."

(7) The earlier decisions of the Georgia Supreme Court which deal with alimony such as *Shepherd v. Shepherd*, 243 Ga. 253 (1979), and *Shepherd v. Shepherd*, 244 Ga. 545 (1979) were more than 90 days before the Application for Certiorari was filed and hence, this Application is not timely filed. Actually, these decisions are more than two years old.

(8) The Petitioner did not file a timely constitutional objection in the trial court. A brief chronology is needed at this point.

(a) December 1, 1972, the Wife filed her Complaint.

(b) January 18, 1972, the Husband filed his Answer omitting any claim that the alimony statutes were unconstitutional.

(c) March 7, 1973, the trial court held a hearing on temporary alimony. After a showing of need on the part of the Wife and a showing of the Husband's ability to pay, the trial court entered an order granting the Wife an award of temporary alimony. The Husband appealed this temporary order.

(d) October 5, 1973, the Supreme Court of Georgia affirmed the trial court's temporary order.

(e) October 31, 1973, the Husband filed for the first time his claim that the proceeding was unconstitutional. Thus, the constitutional objection by the Husband was made only after he had obtained a ruling of both the trial court and the Supreme Court of Georgia. He never made any constitutional objection until he became dissatisfied with the rulings.

(9) The Husband earlier made an application for certiorari to this Court based on these same arguments. Certiorari was denied. (*Shepherd v. Shepherd*, 421 U.S. 932).

ARGUMENT AND CITATIONS

I.

This is the holding from which the Petitioner appeals:

> "It appearing that no application for discretionary appeal has been filed, this case must be and is hereby dismissed."

The decision of the Supreme Court of Georgia rendered in March of 1981 deals only with the question of whether or not the Petitioner properly followed established rules and procedures in an appeal. He did not.

There is nothing in that decision dealing with alimony. Those issues have all been raised and decided in the many appeals which have gone before. What the Petitioner seeks is to use the decision of March, 1981 as a vehicle to open up the prior appellate decisions. Obviously the Petitioner has not timely sought any review of those previous decisions (28 U.S.C. 2101), and there does not seem to be any authority allowing a petitioner in a civil case to go back and gain review by certiorari of final judgments rendered many years ago simply by making a motion.

If the Petitioner is correct, any judgment is open to attack even if the time has run. The procedure is simple. Make any motion, appeal it to the state appellate court, then apply for certiorari and complain about the prior decision.

There is nothing in the present decision of March, 1981 which the Petitioner attacks. Every bit of his argument is directed to decisions made years ago. Even his motion to set aside the judgment has been the subject of three previous appeals: *Shepherd*

v. Shepard, 241 Ga. 485 (June, 1978), Shepherd v. *Shepard*, 243 Ga. 253 (March, 1979), and *Shepherd v. Shepherd*, 244 Ga. 545 (October, 1979). It is those decisions which are brought into question by this Application for Certiorari, and it would seem that such an application is simply not timely.

II.

There was no written motion which was the subject of this appeal. When the trial court held its hearing, there was only some sort of vague oral motion. This does not appear at first glance because the Petitioner did not have the transcript of evidence prepared.[1] Had the Georgia Supreme Court gotten to the merits of the appeal, it likely would have found any such oral motion defective.

The written motion which is included in Petitioner's Applications as Appendix T was filed on March 15, 1979, and was the subject of *Shepherd v. Shepherd*, 243 Ga. 253 (March, 1979), and *Shepherd v. Shepherd*, 244 Ga. 545 (October, 1979).

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1. The Attorneys representing the Petitioner in this Application did not represent him and took no part in any of the trial proceedings. No slight is intended to them by any of this brief. They took the case as they found it and had no chance to perfect it.

III.

Georgia has codified its rules of practice and procedure and modeled them on the Federal Rules of Practice and Procedure. One of these rules is that a motion such as this to set aside a judgment must be brought within three years from the date of the entry of judgment [Ga. Code Ann., §81A-160(A)]. This rule is basically the same as Federal Rule 60 except the Federal Rules provide only a one year period in which to attack the judgment.

No motion was ever made by the Petitioner within the proscribed time period.

The Petitioner seems to acknowledge this when he says the judgment is void on its face, but this is incorrect. A judgment void on its face means usually a jurisdictional defect. Even if a consitituional defect appeared, this is something which would have to be developed and shown from the record because Georgia, like every other jurisdiction, allows the waiver of constitutional provisions (*Pacelet Manufacturing Co. v. Crescent Textiles, Inc.*, 219 Ga. 268).

For example: a criminal conviction entered by the Court without a jury trial is not ipso facto a denial of the constitutional right of a jury trial. Such a right may be waived.

That is what happened in this case.

The Petitioner first answers (January, 1973) and participated in a temporary alimony proceeding (March, 1973). When the Petitioner was dissatisfied with the results of the temporary hearing, he filed an appeal (March, 1973) and obtained a decision from the Supreme Court of Georgia [*Shepherd v. Shepherd*, 231 Ga. 254 (October 5, 1973)]. Only after the appellate decision was unsatisfactory to him did he file an amendment (October 31, 1973) attacking the constitutionality of the proceedings.

The Petitioner's brief implies that a litigant is entitled to file constitutional challenges at any time before the trial. This is incorrect. Georgia Law requires a constitutional challenge to be filed at the first opportunity (*Hazelhurst v. Southern First Distributors, Inc.*, 46 Ga. App. 453).

Georgia, like all other jurisdictions, will not allow a litigant to first try his cause and then appeal it and only then decide whether he is satisfied with the results as a measure of the timeliness of challenging the proceedings. Needless to say, had the result been satisfactory, he would have accepted the decision. This strategy amounts to a failure to properly present a constitutional challenge.

IV.

As mentioned previously, the award of alimony terminated in 1976 and it has been paid. The matters dealing with attorneys fees, costs, interest, etc., are based on the court's common law equitable powers (*Stitt v. Stitt*, 243 Ga. 301, *Stitt v. Stitt*, 243 Ga. 730 and *Ford v. Ford*, 245 Ga. 569).

But it should be pointed out that there is no present statute or decision of the State of Georgia anywhere challenged by the Petitioner. *Orr v. Orr* has been completely and unequivocally accepted by the courts and legislature of the State of Georgia. What the Petitioner complains of is the law in effect in 1973 which was totally and fully and completely repealed in 1979. (*Stitt*, op. cit.; *Ford*, op. cit.)

CONCLUSION

This Application never attempted to set out anything more than a private controversy which should have ended many years ago. If the Petitioner had any matter to bring to this Court it should alsohave been presented in a proper and timely fashion when the decisions were rendered. Instead, the Petitioner failed to appeal any of those decisions and now asks this Court to go back many years and

many decisions by granting a Certiorari application from a ruling that he has failed to properly follow required appellate procedures.

Presumably, if Petitioner is correct, this Court will instruct the Supreme Court of Georgia to consider the points he makes in his application when the Georgia Supreme Court has ruled that he did not properly bring anything to that Court for decision.

Actually, the position of the Applicant is quite simple: every alimony judgment rendered prior to *Orr v. Orr* is void, and any husband can bring any sort of motion to set aside any alimony decree regardless of whether he follows proper appellate rules, regardless of any time limitations, and regardless of whether he properly and timely raised the issue before.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served:

Robert L. Pennington
Kevin C. Greene
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with a copy of the within and foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI, by depositing a copy of same in the United States Mail, in a properly addressed envelope, with adequate postage thereon.

This 24 day of September, 1981.

Glenville Haldi
Attorney for Respondent